UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER,	:	
	:	**Case No. C2-03-665**
on behalf of herself and all others similarly situated,	:	
	:	**Judge Holschuh**
Plaintiff,	:	**Magistrate Judge Abel**
	:	
v.	:	
	:	
NATIONAL FOOTBALL LEAGUE, et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION OF DEFENDANTS NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES, LLC, AND JOHN LOMBARDO, M.D. TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

There is no dispute that it is the duty of the National Football League ("NFL" or "League") to determine the weather conditions in which NFL players play and practice. No less an authority than NFL Commissioner Paul Tagliabue admitted in sworn testimony[1] on November 5, 2002 that this "responsibility" (his word) rests with the League. (Exhibit 4 to Plaintiff's Motion for Class Certification, Tagliabue Dep., p. 95.)[2] The motion filed by defendants does not address as a factual matter whether the League

[1] Commissioner Tagliabue's deposition was taken in the suit brought by Korey Stringer's family against the Minnesota Vikings, its coaches, athletic trainers, and physicians, *Stringer v. Minnesota Vikings*, Hennepin County (Minn.) Court File No. 02-00415.

[2] Because certain exhibits relied on by plaintiff were filed with Plaintiff's Motion for Class Certification, plaintiff will not resubmit them, but rather will identify them using the exhibit numbers assigned to them in that Motion.

violated this duty. Rather, the crucial question posed by defendants' motion is, what was the genesis of this duty, the Collective Bargaining Agreement ("the CBA") between the NFL Players Association ("NFLPA") and the NFL Management Council ("NFLMC"), or common law tort principles?

The NFL would have the Court conclude it was the CBA, but all available evidence belies this contention. The CBA does not even mention weather conditions for playing or practicing, much less heat illness, much less the NFL's responsibility to ensure that the former does not lead to the latter. Defendants have presented no evidence that these issues ever were the subject of collective bargaining between the players' and the teams' bargaining representatives, let alone a collectively bargained agreement.[3] Indeed, within days of Korey Stringer's death, Commissioner Tagliabue said, "*Of all the medical issues we talk about with the players and that the players have raised, heat and how we deal with heat has not been among them*."[4] (Exhibit A hereto, p. NFL 00624; emphasis added.)

It should come as no surprise that hot weather and the risk that a player may suffer injury or die while practicing in it are not mentioned in the CBA, for a quick perusal of that document reveals that its chief concern is, to be blunt, allocating the

[3] When an issue has been the subject of collective bargaining between the NFLPA and the NFLMC to the point where the parties have reached an agreement, there is no mistaking that fact. Take, for example, the issue of "substance abuse." The explicit agreement of the NFLPA and the NFLMC regarding substance abuse is set forth in the CBA itself. (CBA, Art. XLIV, § 6.) Extraordinarily detailed procedures for implementing that policy have been published, which prominently remind the reader that they have been agreed upon by the NFLPA and the NFLMC. (*See* Exhibit B hereto.) To plaintiffs' knowledge, based on documents produced by the NFL in the Minnesota case, no such materials exist regarding the heat issue.

[4] Commissioner Tagliabue confirmed this more than a year later in sworn testimony. (Exhibit 4 to Plaintiff's Motion for Class Certification, pp. 94-95.)

money that professional football generates. It is an agreement between the players' and the teams' bargaining representatives that, for the most part, concentrates on player compensation, player retention, player movement, and the factors that affect all three. Despite all of the risks to which football players are subjected, the CBA does not spell out how the various types of harm that could befall players on a football field are to be prevented. And it does not assign *duties* for preventing them. Indeed, the CBA is so far removed from such considerations that, when he was asked during his November 5, 2002 deposition if "conduct by a team employee that unnecessarily causes or contributes to the death of a player [would] be conduct detrimental to the National Football League," Commissioner Tagliabue replied, "I don't know. Probably not as that term has been interpreted over the years, including a [*sic*] collective bargaining with the Players Association." (Exhibit 4 to Plaintiff's Motion for Class Certification, p. 93.) Even where the CBA addresses injuries that could befall players – again, heat illness is not among them – it does so only in the most general way *and* with reference to the effect that such injuries would have on their compensation. (CBA, Art. XXXII, §§ 2 and 3.) Despite the grave risk of heat illness posed by NFL teams conducting training camp practices in intense summer heat, the only provisions in the CBA that are even remotely related to the conditions at training camps state that players must be provided room and board, per diem, and in-room telephones. (*Id*. at Art. XXXVII, §§ 2, 3, 4, and 7.)

Thus, contrary to defendants' contention that the alleged "duty could arise, if at all, only from the CBA" (Motion, p. 7), there simply is nothing in the CBA from which the alleged duty could arise. No heat-related duty was assigned to or assumed by the NFL or any other defendant in the CBA. Rather, the duties owed by movants – the NFL,

NFL Properties LLC ("NFL Properties"), and John Lombardo, M.D. ("Dr. Lombardo") – to Korey Stringer could only have arisen from common law tort principles.

The duty in question is rooted in the bedrock principle of common law negligence. As Justice Cardozo once put it, "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922). The NFL's heat-related duty arose not because the CBA assigned it to the League, or because the League assumed that duty in the CBA, or because the players' union demanded and bargained for the NFL to perform that duty. Rather, it arose because the NFL decided – in the words of Commissioner Tagliabue – to use its "authority" and take the "responsibility" to enact "some guidelines or policies on the matter . . . [i]n our administrative operations materials . . . ." (Exhibit 4 to Plaintiff's Motion for Class Certification, pp. 95-6.) These "guidelines or policies," which Commissioner Tagliabue said were "in place for a number of years" before Korey Stringer died (*id*. at 98), purported to address the risks of heat illness posed by playing and practicing in "hot weather," including the prevention and treatment of such illness. (Exhibit 2 to Plaintiff's Motion for Class Certification, "Excerpt from 2001 Game Operations Manual on Cold/Hot Weather Conditions," pp. NFL00176-NFL00179.) Having chosen to do so, the NFL assumed the duty "to provide complete, current and competent information and directions to NFL athletic trainers, physicians, and coaches about heat-related illness and its prevention, symptoms, and treatment." (Complaint, ¶ 8.) As plaintiff highlighted in her Motion for Class Certification (pp. 10-12), defendants failed to exercise ordinary care in carrying out this duty.

RELEVANT FACTS

Plaintiff incorporates by reference the facts concerning the death of Korey Stringer, as set forth in her recently filed Motion for Class Certification. For the Court's convenience, that factual background is repeated below.

A. Facts Concerning The Death Of Korey Stringer

1. Day One – Monday, July 30, 2001

Korey Stringer first became ill on the initial day of practice in Mankato, Minnesota, July 30, 2001. Approximately forty-five minutes into the afternoon practice that day, at a time when the heat index was at least 109 (the highest training camp heat index in at least ten years), he vomited multiple times on the practice field. He was not taken out of practice at the first sign of trouble that afternoon, or even after the first time he was seen vomiting.

According to his offensive line coach, Mike Tice, Korey started out practice "okay," but became sluggish. Tice noticed that he was slow getting back in line, was quiet and not his usual talkative self, and had a look of anguish on his face. Korey told Tice that his stomach was killing him, that his stomach was "just really bad." Tice told Korey to "get some water." Tice saw Korey doubled over and throwing up, making loud noises. It seemed to him that Korey was struggling. When Tice asked Korey if he was okay, Korey said yes. Tice did not take Korey out, but rather just kept an eye on him, even though Tice was worried that he really was not alright.

Korey threw up again in the fourth segment of the Monday afternoon practice, which concerned Tice because it was not a high energy period. Tice thought something was wrong. Korey was throwing up substantially. At that point, Tice called for an athletic trainer and removed Korey from practice. As head trainer Chuck Barta was walking toward Korey, Korey vomited again. Barta talked briefly with Korey, who again complained of an upset stomach. After about a minute or two, Korey vomited yet again. At that point, Barta insisted on escorting him to a trailer located just off the field. Barta walked inside the trailer with Korey. Fred Zamberletti, the Vikings medical services coordinator, was already there assisting another player. Barta told Zamberletti that Korey had been vomiting and that he was being brought to the trailer "to cool down."

Between 5:00 and 5:15 p.m. on July 30, the Vikings' training camp physician, Dr. W. David Knowles, arrived at the practice field. Barta informed him there were two players in the trailer and asked him to "take a look at them." Dr. Knowles went inside the trailer. He claims he asked Korey how he was doing and that Korey responded that he was fine. A Vikings trainer who was present claims Dr. Knowles did not speak to Korey or to anyone about Korey. In any event, Dr. Knowles did not examine Korey at all. Nevertheless, he later would dictate the following note to Korey's medical record regarding their encounter on the afternoon of July 30: "The patient had an episode of heat exhaustion during afternoon training camp. He recovered without incident following rest and hydration." Dr. Knowles did not treat Korey for heat exhaustion or make any recommendations regarding recovery or limitations on his activities for that day or for subsequent days. After leaving the trailer, Dr. Knowles told Barta that "everything's okay."

2. Day Two – Tuesday, July 31, 2001

The National Weather Service forecast for the morning of July 31 included two "heat advisories" for Mankato predicting heat index values of 105 to 110, as well as a "weather message" for "dangerously hot and humid conditions," which stated that "extremely humid conditions will team up with hot weather to produce potentially life-threatening conditions." Eleven Vikings players, about thirteen percent of the team, would suffer heat illness that day, including Korey.

Between 8:00 and 8:30 on the morning of July 31, just prior to the start of practice, Korey told Barta he still had an upset stomach, a sign he had not yet recovered from the prior day's heat exhaustion. Barta gave him Tums, but did not perform any of the routine tests necessary to determine if Korey had recovered from heat exhaustion, including taking his temperature or assessing orthostatic blood pressure changes.

Despite the danger of heat stroke on the second day of heat exposure, the Vikings' coaches required the players to practice in full pads and uniforms, rather than cutting to shorts and upper pads or shorts and t-shirts. Dr. Knowles went to the Vikings training camp on the morning of July 31, but did not see or speak to Korey, or speak to anyone about Korey.

Practice began that morning at approximately 8:45. Barta did not instruct any of the athletic trainers to monitor Korey or his fluid intake during practice, and no athletic trainer actually was monitoring the offensive line on a continuous basis during the time when Korey was practicing that morning. The Vikings never gave their athletic trainers or interns any training or instruction in how to spot the signs or symptoms of heat illness;

nor did the team inquire or investigate whether they had received such training elsewhere. The Vikings' team physicians never established any oral or written protocols for the athletic trainers to use in dealing with heat illness or emergencies.

At about 10:25 on Tuesday morning, Matt Birk, also a Vikings offensive lineman, was standing beside Korey and saw him vomit clear fluid. Apparently on a separate occasion that morning, assistant offensive line coach Dean Dalton also saw Korey throw up. Formal practice ended at 11:10 a.m. Barta gave his cell phone to assistant trainer Paul Osterman and told him to call the more senior Zamberletti in the athletic training room "if anything comes up." Barta went off with head coach Dennis Green to tend to a scrape on Green's leg. Osterman put the phone in his pocket. He never used it to call Zamberletti or Barta.

Korey did eight pass sets with the other offensive linemen (extra work required by Tice), then went down to one knee. Cory Withrow, another offensive lineman, asked Korey if he was okay. Korey grunted, but did not respond. Withrow asked if Korey wanted a trainer; he thought Korey shook his head no, but he was not sure. Korey walked 40 to 50 yards toward the blocking dummy known as "Big Bertha," which Tice required the players to hit multiple times in succession as yet another additional drill. At approximately 11:15 a.m., Korey collapsed on the field 20 to 30 feet from Big Bertha. He first rolled onto his right side, then onto his back, holding his stomach, then his head, and then throwing his arms over his head. According to photographer Billy Robin McFarland, who photographed Korey after his collapse, Korey was on the ground up to five minutes moaning quite audibly the entire time. A photograph taken by McFarland at approximately 11:15 a.m. shows Korey lying on the ground with pale blue palms and

lips, while Barta and Green drive away on a cart. According to Withrow, he heard Korey panting and moaning on the ground. Birk asked Korey if he wanted an athletic trainer and Korey said "yes." Withrow thought to himself that "something is wrong" and called out "trainer."

At 11:20 a.m., Osterman, the assistant athletic trainer holding Barta's cell phone, and Dan Kearney, an intern athletic trainer, both responded. Kearney asked Korey how he was doing, but Korey did not respond. Like vomiting and an upset stomach, pallor and collapse are common signs of heat illness. Osterman, wearing sunglasses, claims he did not notice Korey's pallor. In fact, Osterman later said he doubted he could recognize when an African-American person is pale. Korey got to one knee, then got up off the ground and incorrectly struck Big Bertha only once. Accounts differ as to whether he stumbled away from Big Bertha and toward the trailer, or half-jogged over to it. In any event, Osterman directed him to the trailer, instead of to the athletic training room where there were ice pools for cooling.

At no later than 11:25 a.m., Korey entered the trailer and Osterman followed. Inside the trailer, which supposedly was kept at a constant 62 degrees, it was cool enough to fog Osterman's sunglasses. Kearney went to get water for Korey. Korey sat down on one of the two treatment tables. He and Osterman did not speak during Kearney's absence, and Osterman did nothing for him while waiting for Kearney. Between 11:25 and 11:30 a.m., Kearney arrived with the water. He stayed a minute or so, then departed to clean up, leaving Korey alone again with Osterman. Ten to fifteen minutes had elapsed since Korey had collapsed to the ground outside. Osterman said to Korey, "You need to drink some water, Korey." Korey complied, drinking one or two sips. Korey got off the

treatment table and lay down on the floor, his first movement inside the trailer. Osterman "let Korey relax" for ten minutes.

Between 11:35 and 11:40 a.m., ten minutes after Kearney left and while Korey was still on the floor, Korey sat up and asked Osterman to take off his shoes and socks and cut off his tape. Between 11:37 and 11:42 a.m., two minutes or "a little longer" after Korey asked Osterman to remove his shoes, Osterman completed the task. Korey said "Thank you." Those were the last words he would speak. Osterman noticed that Korey was still sweating more than 20 minutes after stopping his last exertion, but the trainer thought that "everything was normal."

Osterman did not consider placing ice on Korey or fanning him. No Vikings personnel ever used or considered using ice to cool Korey down. Osterman thinks that Korey drank some more water during this period. Korey got up off the floor and sat on the table again, his second movement inside the trailer. At approximately 11:47 a.m., Korey began humming to himself and bobbing his head back and forth. Osterman did not view this as evidence of Korey's altered mental status, a warning sign of heat stroke. Osterman did not engage in any conversation with Korey to test his mental status.

By the time Korey began humming, ten minutes "or longer" had elapsed since Osterman finished removing shoes, socks, and tape. At that point, Osterman called the athletic training room and asked one of the athletic trainers to bring the cart to pick up Korey and him. According to Osterman, it had been at least 20 minutes, "maybe more," since they entered the trailer. Korey's humming continued for a couple minutes. Osterman said, "Korey, we're going to bring the cart here and we're going to take you inside." Korey did not respond to that statement. Osterman said nothing else to him.

Detachment in a hot athlete can be a warning sign of heat stroke, but Osterman did not interpret Korey's detachment as a sign of anything. Osterman claims he called for the cart as a matter of procedure, not because he sensed that anything was wrong with Korey. Osterman waited at least twenty minutes in the trailer with Korey before he called for the cart and it took at least five to ten minutes for the cart to arrive.

In the meantime, Korey got off the treatment table and lay down on the floor again, his third movement inside the trailer. Korey, normally a friendly and very talkative person, had said nothing since "thank you" at least ten minutes earlier and had spoken only a few words in the entire half-hour they had been insider the trailer. Osterman did not view Korey's silence as a sign of his altered mental status. After a while, Osterman applied an ice towel to Korey's head, but Korey shoved it away without saying anything. Although a hot athlete's irritability can be a warning sign of heat stroke, Osterman did not attach any significance to Korey's action. At approximately 11:52 a.m., Kearney arrived with the cart. Osterman estimated that thirty minutes had elapsed since Osterman and Korey entered the trailer; he also estimated that five to ten minutes had elapsed since Osterman called for the cart. Osterman said, "Korey, the cart's here. Let's get up." According to Osterman, Korey was "unresponsive" and did not move, and, "That was the first sign that something was going wrong. . . . I really wasn't sure what was going on at that point. I was pretty confused." According to Kearney, Korey was unresponsive, but moved his head and arms slightly as if trying to lift them.

Osterman and Kearney tried to lift Korey, but could not do it. Osterman and Kearney rolled him onto his side. Osterman said to Kearney, "Hurry up. Get me some ice towels and go get Fred," referring to Zamberletti. At approximately 11:54 a.m., two

to three minutes after Kearney had arrived at the trailer in the cart, Kearney got back onto the cart to retrieve Zamberletti. Osterman checked to see that Korey had a pulse but did not count the beats. According to Osterman, Korey's pulse was "weak" but "steady." Osterman did not take Korey's temperature or even consider taking it. According to Osterman, Korey was still sweating after thirty-five minutes in the trailer and his skin felt "cool and moist." Contrary to popular belief, continued profuse sweating long after exercise ceases is a sign of heat stroke.

At approximately 11:57 a.m., Kearney and Zamberletti arrived back at the trailer. Korey's breathing was rapid and shallow. Zamberletti looked at Korey and said, "Oh, he's hyperventilating." Zamberletti thought Korey had "just fainted," or had had a seizure as a result of "an insect bite" or "some medication." Zamberletti instructed Kearney to put a zip lock bag over Korey's nose and mouth. Kearney complied, holding the bag there for one to one and one-half minutes. Thus, the already oxygen-deprived Korey was further deprived of oxygen. Holding the bag over Korey's nose and mouth while he already was struggling to breathe had a suffocating effect and caused him to suffer metabolic acidosis, which further attacked his brain cells and other organ tissues. According to Zamberletti, the bag worked because he saw Korey rise up on his knees and open his eyes. Zamberletti did not recognize this as "fight instinct." Kearney did notice any improvement in Korey's breathing as a result of the bagging.

Neither the Vikings nor their physicians had established any emergency plans or procedures; nor had they made any arrangements to get ambulance service. Zamberletti told Osterman to call Dr. Knowles. Osterman called Dr. Knowles' direct line, but he did not answer. Osterman then called Dr. Knowles' nurse and left a message with her.

Osterman told Zamberletti, "I think we need to get him to the hospital." Zamberletti told Osterman to call for "the van." Osterman called a public relations intern to bring the van so that Korey could be taken to the hospital. Finally, at 12:00 p.m., Osterman called for an ambulance. While waiting for it to arrive, a period of approximately nine minutes, Zamberletti, Osterman, and Kearney did nothing to help cool Korey down or to give him any other aid. During the entire time that Korey spent with Vikings athletic trainers inside the trailer on July 31 (almost 50 minutes), no one there measured his vital signs or his temperature. Also, Korey was inside the trailer for at least 40 minutes with at least one athletic trainer before an ambulance was called, even though Osterman had a cell phone in his pocket the entire time.

At 12:08 p.m., the ambulance arrived at the trailer. First contact with Korey was at 12:09 p.m. Korey was grunting and breathing rapidly, a sign that he was unable to protect his own airway. One EMT noted that he still was dressed in football pants and a t-shirt. The other EMT recalled that he was wearing uniform pants but was stripped to the waist. Korey was placed on a long backboard and was moved from the trailer to the ambulance. The paramedics determined that Stringer's life was in immediate danger, so a call was placed to the ambulance dispatcher, who in turn called the hospital to let them know that a patient would be arriving whose life was in immediate danger. At 12:18 p.m., the ambulance departed for the hospital, a distance of approximately two miles. En route to the hospital, Korey's pulse was measured for the first time. It was 140, more than an hour after he ceased all exertion.

At 12:24 p.m., the ambulance arrived at the hospital and pulled into the emergency room garage. While still in the ambulance, Korey began to vomit clear fluid

(like water). He was tipped on his side to avoid aspiration. The ambulance was met by hospital personnel, and Korey was moved into the emergency room at Immanuel St. Joseph's Hospital. At 12:35 p.m., his rectal temperature was 108.8° F. He died approximately thirteen hours later. Despite exhibiting the signs and symptoms of serious heat illness over a two-day period, the sum total of the "treatment" that Korey received from Vikings personnel in that period consisted of Tums and the very harmful bagging procedure ordered by Zamberletti.

SUMMARY OF LEGAL ARGUMENT

The NFL, NFL Properties, and Dr. Lombardo seek an order dismissing or entering summary judgment on plaintiff's state-law wrongful death/survivor claims for negligence on the ground that they are preempted under §301 of the Labor Management Relations Act ("LMRA"). This motion should be denied for the following reasons: (1) as non-signatories to the CBA between the NFLMC and the NFLPA, the NFL, NFL Properties, and Dr. Lombardo, cannot properly invoke it, and plaintiff Kelci Stringer is not bound by it, for purposes of preemption under §301 and/or arbitration; (2) defendants' preemption argument fails in any event because plaintiff's state-law wrongful death/survivor claims arising out of her husband's death can be resolved without interpreting the CBA and because any duty breached by defendants would be a creature of state tort law, not the CBA; (3) defendants' motion for summary judgment is premature and should be held in abeyance pursuant to Rule 56(f), insofar as it raises or might hinge on factual issues as to which plaintiff has not yet been able to conduct discovery; and (4) insofar as it could be construed to relate to the claims of the putative class, defendants' motion is premature because the class has not yet been defined or certified.

LEGAL ARGUMENT

A. As Non-Signatories To The CBA Between The NFLMC And The NFLPA, The NFL, NFL Properties, And Dr. Lombardo, Cannot Properly Invoke It, And Plaintiff Kelci Stringer Is Not Bound By It, For Purposes Of Preemption Under §301 Of The LMRA, And/Or Arbitration.

Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting

commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." The NFL, NFL Properties, and Dr. Lombardo all contend that this section preempts plaintiff's claims against them.

The Sixth Circuit has held that §301 applies to the "parties" to the collective bargaining agreement in question. *Metropolitan Detroit Bricklayers District Council v. J.E. Hoetger & Co.,* 672 F.2d 580, 583 (6th Cir. 1982). It cannot apply to "a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory are stated in the terms and conditions of the contract." *Service, Hospital, Nursing Home, and Public Employees Union v. Commercial Property Services, Inc.,* 755 F.2d 499, 506 (6th Cir.), *cert. denied,* 474 U.S. 850, 106 S.Ct. 147, 88 L.Ed.2d 122 (1985).[5]

This is not a suit for violation of a contract "between an employer and a labor organization," the threshold requirement for applying §301. None of these movants was Korey Stringer's employer and Kelci Stringer has not sued any labor organization that represented her husband.

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[5] Other circuits are in agreement. *See, e.g., Bowers v. Ulpiano Casal, Inc.,* 393 F.2d 421, 423 (1st Cir. 1968); *Aacon Contracting Co., Inc. v. Ass'n of Catholic Trade Unionists,* 276 F.2d 958 (2d Cir. 1960); *Aacon Contracting Co., Inc. v. Ass'n of Catholic Trade Unionists,* 178 F.Supp.129 (E.D.N.Y. 1959); *International Union, UMWA v. Covenant Coal Corporation*, 977 F.2d 895 (4th Cir. 1992); *Carpenters Local Union No. 1846 v. Pratt- Farnsworth, Inc.,* 690 F.2d 489, 502 (5th Cir. 1982), *cert. denied,* 464 U.S. 932, 104 S.Ct. 335 (1983); *Loss v. Blakenship,* 673 F.2d 942, 946 (7th Cir.1982); *Painting and Decorating Contractors Ass'n of Sacramento v. Painters and Decorators Joint Committee of the East Bay Counties, Inc.,* 707 F.2d 1067 (9th Cir. 1983), *cert. denied,* 466 U.S. 927, 104 S.Ct. 1709 (1984); *United Food and Commercial Workers Union v. Quality Plus Stores, Inc.,* 961 F.2d 904 (10th Cir. 1992).

Furthermore, none of these movants is even a party to the CBA. The agreement itself identifies the contracting parties as the NFLPA and the NFLMC. The NFLMC, which is not a party to this suit, is described in the CBA's Preamble as "the sole and exclusive bargaining representative of present or future employer member Clubs of the National Football League ('NFL' or 'League')" (CBA, p. 3), meaning that it "represents the separate corporations that own franchises in the NFL and employ the union members as football players." *Brown v. NFL*, 219 F.Supp.2d 372, 383 (S.D.N.Y. 2002). In other words, the CBA in effect is an agreement between the players and the teams that employ them.

The CBA clearly is not an agreement between the NFLPA and NFL Properties. Nor does it define any of NFL Properties' duties. Movants have presented no evidence that NFL Properties is an agent of the NFLMC. It is not owned by the League, but rather is a separate California corporation that approves, licenses, and promotes equipment used by NFL teams (Complaint, ¶ 7), and is owned by the teams jointly. *Shutt Ath. Sales Co. v. Riddell, Inc.*, 727 F.Supp. 1220, 1222 (N.D.Ill. 1989).

The CBA also is not an agreement between the NFLPA and Dr. Lombardo. Nor does it define any of his duties. Rather, Dr. Lombardo is a physician retained by the NFL as a medical consultant, to whom the NFL apparently has given the authority and responsibility to formulate and articulate policies and rules regarding health issues. (Complaint, ¶ 7.) Defendants have not presented any evidence that Dr. Lombardo is an employee or agent of the NFLMC.

The CBA also is not an agreement between the NFLPA and the NFL. *Brown*, 219 F.Supp.2d at 383. While some League functions are mentioned in the CBA, no "rights or

duties" related to the heat issue are assigned to the NFL in that document. *Service, Hospital, Nursing Home, and Public Employees Union,* 755 F.2d at 506.

Therefore, under the language of §301 and the foregoing Sixth Circuit case law interpreting it, movants should not be allowed to invoke §301 as the basis for preemption.

In addition, plaintiff Kelci Stringer was not a signatory to the CBA, or an employee of the NFLMC, the NFL, or any NFL team. This is relevant to movants' contention that her claims must be arbitrated. Because the pending motion does not specify which arbitration clause defendants are relying on, plaintiff must analyze each of them. As the Complaint indicates, Kelci Stringer is bringing her claims as the duly appointed personal representative of Korey Stringer's estate. (Complaint, ¶ 5.) In order for the claims she is bringing in that capacity to be subject to mandatory arbitration, they must fit within the scope of the asserted arbitration clause. *International Union v. General Electric Co.*, 474 F.2d 1172, 1176 (6th Cir. 1973); *District 318 Service Employees Assn. v. Ind. Sch. Dist. 318*, 649 N.W.2d 896, 898 (Minn. App. 2002).

The standard player contract, which is Appendix C to the CBA, provides that any dispute "between Player and Club involving the interpretation or application of any provision of this contract" must be submitted to arbitration under the CBA. (CBA, Apx. C, ¶ 19.) This clause has no application here for two reasons. First, no dispute exists between the "Player" and the "Club." "Player" is defined as Korey Stringer at the beginning of the player contract, but the term is not specifically defined in the CBA. Only Korey Stringer meets any reasonable definition of "player." After all, only Korey Stringer could perform as a professional football player with all of the rights and

obligations that go with that role. Korey Stringer is now deceased. As personal representative of Korey's estate, Kelci Stringer is not a "Player" and thus is not subject to the clause. The law's recognition of an individual's estate as a separate legal entity from the individual further shows the intention to distinguish between an individual and those who can assert a wrongful death action. Second, this case does not involve a "dispute" between the "Player" and the "Club," as those terms are used in the player contract. Korey Stringer is now dead. He cannot have a dispute with the NFL or the Vikings.[6] For these reasons, the arbitration clause in the player contract does not require arbitration of Kelci Stringer's claims.[7]

The body of the CBA contains a provision for arbitration of a "non-injury grievance." (CBA, Art. IX.) This clause does include language applying the arbitration clause to "compliance with" the terms of the CBA or the player contract. This additional language, however, makes no difference in the analysis. As discussed above, Korey Stringer, the player, is not asserting any claim here. The CBA does not contemplate assertions of injury causing death. The agreement provides specifically for a process where a player is terminated due to an incapacitating injury, an "injury grievance" under Article X. Article IX, the "non-injury grievance" provision, requires "a player" to initiate the grievance. Here, however, no player is alive to initiate the grievance. The tort claim, instead, is being asserted by the personal representative of his estate. In any event,

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[6] It is interesting to note that the contract, by its very terms, terminates upon the death of the player. (CBA, Apx. C, ¶ 12.) The player contract does survive death where, as here, the death is related to an injury, but that appears to be limited to the right of the player's "stated beneficiary" or estate to receive the balance of the salary for the year in which the death occurs. (*Id*. at ¶ 9.)

[7] It should be noted that the contract does not purport to require arbitration of "compliance" with its terms. This demonstrates the limited nature of this clause.

requiring arbitration of grievances involving compliance with the CBA or the player contract would not even mandate arbitration of tort actions brought by players against the NFL for negligence. *Brown v. NFL*, 219 F.Supp.2d at 389.

The NFL cites a number of decisions from other jurisdictions interpreting the National Labor Relations Act and the CBA. None of these decisions, however, controls in this case given the critical distinction between the nature of the parties involved there and here; each of those cases involves individuals who are alive and able to assert collectively bargained rights. Since Korey Stringer cannot do so, and his estate and heirs must assert claims provided by law, the requirements of the NLRA and the CBA simply have no force here. If the NFLMC had wished to bind *players'* heirs to the arbitration clause, it could have required additional language in the CBA to the effect that "heirs, representatives, successors and assigns" fit within the definition of "player." As it is, the CBA only purports to bind the "heirs, executors, administrators, representatives, agents, successors and assigns" of "the Parties hereto," which, as noted, were the NFLPA and the NFLMC. (CBA, Art. LV, § 14.) Kelci Stringer is not the heir of either of these entities. Thus, the CBA does not require arbitration in this setting.

B. Defendants' Preemption Argument Fails In Any Event Because Plaintiff's State-Law Wrongful Death/Survivor Claims Arising Out Of Her Husband's Death Can Be Resolved Without Interpreting The CBA And Because Any Duty Breached By Defendants Would Be A Creature Of State Tort Law, Not The CBA.

In ruling on a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and must determine whether the plaintiff undoubtedly can prove no set of facts in

support of her claim that would entitle her to relief. *Ziegler v. IBP Hog Mkt., Inc.,* 249 F.3d 509, 512 (6th Cir. 2001).

The pending motion asserts that the negligence causes of actions brought against the NFL, NFL Properties, and Dr. Lombardo actually are contract disputes that are governed by the CBA and, thus, preempted by §301. When the Supreme Court initially recognized the preemptive effect of §301 on tort claims that were "inextricably intertwined with consideration of the terms of the labor contract," it cautioned courts that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by §301" and that "it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights or obligations, independent of a labor contract." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 213, 105 S.Ct. 1904, 1912 (1985).8 With that admonition in mind, the Sixth Circuit has established a two-step test to resolve §301 preemption issues:

> First, the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law.

DeCoe v. General Motors Corp., 32 F.3d 212, 216 (6th Cir. 1994) (citations omitted).

The Sixth Circuit has held that "if the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement." *Id*., citing *Dougherty v. Parsec, Inc.,* 872 F.2d 766, 770 (6th Cir.

[8] References to medical care (*e.g.*, second opinions) to which players are entitled under the CBA are, at best, tangential, since none of those provisions relate to medical care for heat illness or an emergency, which Korey Stringer needed. It would be absurd

1989). "Moreover, neither a tangential relationship to the CBA, nor the defendant's assertion of the contract as an affirmative defense will turn an otherwise independent claim into a claim dependent on the labor contract." *DeCoe,* 32 F.3d at 216, citing *Fox v. Parker Hannifan Corp*., 914 F.2d 795, 800 (6th Cir. 1990). The Supreme Court has "stressed that it is the legal character of a claim, as independent of rights under the collective-bargaining agreement (and not whether a grievance arising from precisely the same set of facts could be pursued) that decides whether a state cause of action may go forward." *Livadas v. Bradshaw*, 512 U.S. 107, 123, 114 S.Ct. 2068 (1994) (internal citations and quotations omitted). "The bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.*

In this situation, application of the two-step test leads inevitably to the conclusion (1) that plaintiff can prove all of the elements of her negligence claims without *any* interpretation of the CBA's terms, and (2) that the duty at stake here is a creature of the basic common law of negligence independent of the CBA. Thus, it cannot be said that resolution of plaintiffs' claims depends on the terms of the CBA.

In proving the elements of her negligence claims, it would be pointless for plaintiff to rely on the terms of the CBA, given that it is silent on any matters involving hot weather or heat-related illness. The elements of ordinary negligence are well settled. To prevail on such a claim, a plaintiff must show the existence of a legal duty, a defendant's breach of that duty, and injury as a proximate cause of the defendant's breach. *Wallace v. Ohio Dept. of Commerce* 96 Ohio St.3d 266, 274 (2002); *Mussivand*

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to suggest that the CBA was the only reason he received medical care. He received care,

v. David, 45 Ohio St.3d 314 (1989). Defendants' argument focuses exclusively on the duty element. They contend that the alleged "duty could arise, if at all, only from the CBA." (Motion, p. 7.) To the contrary, plaintiff can establish the existence of defendants' duty without any reference to the CBA. As noted, the CBA does not define any duties of the NFL, NFL Properties, or Dr. Lombardo regarding heat or heat illness. Only analysis under the common law yields such a duty. Under the common law, "[a]ny number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall." *Mussivand*, 45 Ohio St.3d at 318 (internal citations and quotation marks omitted). The common-law duty of care is that degree of care which an ordinarily reasonable and prudent person exercises, or is accustomed to exercising, under the same or similar circumstances. *Id.* at 318-19. A person is to exercise that care necessary to avoid injury to others. *Id.* It is well settled that a voluntary act gratuitously undertaken must be performed with the exercise of due care under the circumstances. *Glanzer v. Shepard*, 233 N.Y. at 239, 135 N.E. at 276; *Briere v. Lathrop Co.*, 22 Ohio St. 2d 166, 171-172 (1970); *Thomas v. Tennessee Valley Authority*, 769 F. 2d 367, 370 (6th Cir. 1985); *Bloom v. New York*, 78 Misc. 2d 1077, 1078, 357 N.Y.S.2d 979, 981 (1974); Prosser, *Law of Torts* (3d ed.), p. 339; *Isler v. Burman*, 305 Minn. 288, 295, 232 N.W.2d 818, 821-22 (1975); *see also* Restatement of Torts (Second), §§ 323, 324A. This most basic tort duty arises by operation of law and applies to every person in society, regardless of the identity of the wrongdoer or the victim.

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such as it was, because the team placed his life in jeopardy.

As noted above, plaintiff alleges that the NFL had a duty "to provide complete, current and competent information and directions to NFL athletic trainers, physicians, and coaches about heat-related illness and its prevention, symptoms, and treatment." (Complaint, ¶ 8.) This duty arose for reasons independent of the terms of the CBA. It arose because the NFL decided to undertake the "responsibility" to enact "some guidelines or policies on the matter" and to publish those guidelines for the use of teams and team employees in the NFL's Game Operations Manual. (Exhibit 2 to Plaintiff's Motion for Class Certification; Exhibit 4 to Plaintiff's Motion for Class Certification, pp. 95-6.) In enacting guidelines regarding the risks of heat illness posed by playing and practicing in "hot weather," the NFL was obligated to use reasonable care to avoid causing injury to others, including Korey Stringer, who would take part in NFL games and practices.[9] Without any reference to or reliance on the CBA, the NFL voluntarily undertook the duty to develop and promulgate those guidelines. (*Contrast with* Exhibit B hereto and CBA, Art. XLIV, § 6.) Without any reference to or reliance on the CBA, the Complaint documents in detail the failure of the NFL to carry out this duty with ordinary due care, Complaint, ¶¶ 21, 30, Dr. Lombardo's failure to carry out his duty as NFL medical consultant with ordinary care, Complaint, ¶¶ 21, 39, and the failure of the NFL

[9] *See, e.g., Toone v. Adams,* 262 N.C. 403, 137 S.E.2d 132 (1964) (umpire and baseball club had duty to protect personal safety); *Gerrity v. Beatty*, 71 Ill.2d 47, 373 N.E.2d 1323 (1978) (school district had duty to protect from unsafe or inadequate football equipment); *Hadley v. Witt Unit School District 66* (1984) 123 Ill.App.3d 19, 462 N.E.2d 877 (1984) (school district negligent for furnishing faulty equipment); *Lynch v. Board of Education of Collinsville Community Unit District No. 10,* 82 Ill.2d 415, 412 N.E.2d 447 (1980) (same); *Castro v. Chicago Park District,* 178 Ill.App.3d 348, 533 N.E.2d 504 (1988) (league had duty to supervise and protect players); *Peterson v. Multnomah County School District No. 1,* 64 Or.App. 81, 668 P.2d 385 (1983) (organization liable for failure to make safety recommendations in football);

and NFL Properties to ensure that the equipment players were required to use were adequate to prevent heat-related illnesses. Complaint, ¶¶ 21, 66-67. Therefore, without any reference to or reliance on the terms of the CBA, plaintiff can establish these duties and defendants' negligence in carrying them out. The complaint is not a disguised contract claim, but a claim for a tort.

The principal decisions relied on by movants as support for their preemption argument – *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161 (1987), and *United Steelworkers v. Rawson,* 495 U.S. 362, 110 S.Ct. 1904 (1990) – are inapposite. Unlike this case, both *Hechler* and *Rawson* involved claims against labor unions that were, according to the pleadings, predicated explicitly on the terms of collective bargaining agreements.

In *Hechler*, the complaint made explicit reference to the terms of the collective bargaining agreement as the basis for the asserted duties. *Hechler*, 107 S.Ct. at 2164. Indeed, the plaintiff in *Hechler* conceded that "[t]he nature and scope of the duty of care owed [her] is determined by reference to the collective bargaining agreement." *Id.* Thus, the *sine qua non* of the plaintiff's claim against the defendant labor union in *Hechler* was the fact that, in the collective bargaining agreement itself, the union had expressly assumed the duty to ensure a safe working environment. *Id*. at 2168. Thus, the duty relied on in *Hechler* was without existence independent of the collective bargaining agreement. The instant case is easily distinguished from *Hechler*. There simply is nothing in the CBA from which the duty allegedly owed by the NFL defendants could be claimed to arise. No heat-related duty was assigned to or assumed by the NFL or any

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Wattenbarger v. Cincinnati Reds, Inc, (1994) 28 Cal.App.4th 746, 33 Cal.Rptr.2d 732

other defendant *in the CBA*. The NFL, NFL Properties, and Dr. Lombardo are not parties to the CBA, that agreement is silent on the issues of heat and heat illness, and the Complaint does not mention the CBA as the basis for defendants' duties.

Rawson is equally inapposite. As in *Hechler*, the complaint in *Rawson* explicitly grounded the alleged duty in the provisions of the collective bargaining agreement that the defendant union had signed. *Rawson*, 110 S.Ct. at 1910. The plaintiff alleged that the union was negligent in failing to enforce the terms of the collective bargaining agreement and specifically that union representatives had failed to inspect the mine, as had been agreed in the collective bargaining agreement. *Id.* The Supreme Court held that the plaintiffs' explicit references to the requirements of the collective bargaining agreement could only be interpreted as alleging a duty that the union had assumed in the labor contract itself, a conclusion that led inexorably to the same result reached previously in *Hechler*. *Id.* It therefore bears repeating that, in the instant case, there simply is nothing in the CBA from which the duty allegedly owed by the NFL defendants could be claimed to arise. No heat-related duty was assigned to or assumed by the NFL or any other defendant in the CBA. The NFL, NFL Properties, and Dr. Lombardo are not parties to the CBA, that agreement is silent as to the issues of heat and heat illness, and the Complaint does not mention the CBA as the basis for defendants' duties. Thus, *Rawson* is easily distinguished as well.

Defendants' attempt to expand §301 preemption beyond its recognized limitations should be rejected. The right that plaintiff seeks to vindicate was borne of basic state-law negligence principles, does not invoke contract interpretation, and does not substantially

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(baseball organization owed duty to care for participants in tryouts).

implicate the terms of any collective bargaining agreement. *DeCoe*, *supra*. Therefore, there can be no preemption. *Id.*

C. The Motion for Summary Judgment Is Premature And Should Be Held In Abeyance Pursuant To Rule 56(f), Insofar As It Raises Or Might Hinge On Factual Issues As To Which Plaintiff Has Not Yet Been Able To Conduct Discovery.

A motion for summary judgment cannot be granted unless, based on the evidence submitted, it is clear that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Federal Rules of Civil Procedure 56(c). The moving party bears the burden of proving summary judgment should be granted after ample time for discovery. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). No discovery has taken place at this time. The parties' Rule 26(f) conference has not yet taken place. Therefore, under Rule 26(d), no discovery can be initiated at this time. To the extent defendants' motion for summary judgment raises or might hinge on factual issues as to which plaintiff has not yet been able to conduct discovery – *e.g.*, the circumstances surrounding the adoption of the NFL's "hot weather" guidelines – the summary judgment motion is premature and should be held in abeyance pursuant to Rule 56(f). *Rawson*, 110 S.Ct. at 365-66 (citing *Dunbar v. United Steelworkers of America*, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, *Steelworkers v. Dunbar*, 446 U.S. 983, 100 S.Ct. 2963 (1980).)

D. Defendants' Motion To Dismiss Or Enter Summary Judgment With Respect To The Claims Of The Putative Class Also Is Premature.

Defendants NFL motion to dismiss is premature and should be held in abeyance pending a determination of Plaintiff's Motion for Class Certification. It is axiomatic that due process would not permit a court to enter a binding judgment against an undefined, uncertified class. *See also Bowling v. Pfizer,* 142 F.R.D. 302, 303 (S.D.Ohio 1991).

CONCLUSION

For all of the foregoing reasons, plaintiff respectfully requests that the Court deny the pending motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted,

/s/ Paul M. De Marco
Stanley M. Chesley, Esq., Ohio ID 0000852
Paul M. DeMarco, Ohio ID 0041153
Louise M. Roselle, Ohio ID 0014844
Renee A. Infante, Ohio ID 0052142
1513 Fourth & Vine Tower
Cincinnati, Ohio 45202
(513) 621-0267
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via email upon all counsel of record in this case this 4th day of December, 2003.

/s/ Paul M. De Marco